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State v. Orr Appellant's Brief Dckt. 43592

IN THE SUPREME COURT OF THE STATE OF IDAHO

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STATE OF IDAHO, Plaintiff/Respondent v. DAWN MARIE ORR, Defendant/Appellant.	)	Supreme Court No. 43592 District Court No. CR-2015-218

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APPELLANT'S BRIEF

Appeal from the District Court of the Fifth Judicial District for Twin Falls County
Honorable Randy J. Stoker, District Judge, Presiding

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I.

STATEMENT OF THE CASE

Defendant Dawn Marie Orr appeals from the Amended Judgment of Conviction Upon a Plea of Guilty to Five Felony Counts, and Order of Commitment entered by the District Court for five counts of Grand Theft, in violation of Idaho Code § 18-2403(1); -2407(1)(b)(1). R., pg. 112-118.

Dawn Orr was employed by the College of Southern Idaho (the College) for approximately 17 years, working in the business office. Exhibits, pg. 17 (PSI, pg. 16). On July 31, 2014, Ms. Orr admitted to her superiors at the College that she had been taking money from the College by exchanging checks for cash from the safe and by overstating third party billings. R., pg. 14. Ms. Orr later revealed that she had been taking money from the College since 2007, approximately seven years. R., pg. 14.

On January 7, 2015, Ms. Orr was charged by Complaint with five counts of Grand Theft, I.C. § 18-2403(1); -2407(1)(b)(1). R., pg. 10-12. Ms. Orr waived preliminary hearing in the matter and was bound over to the District Court on all charges. R., pg. 65-67. Ms. Orr subsequently entered into a plea agreement with the State wherein she pleaded guilty to all five counts of Grand Theft. R., pg. 79. In exchange for Ms. Orr's plea of guilty, the State agreed to recommend, on each count, a sentence of five years fixed, to be served, followed by an indeterminate period of nine years, and all counts to run concurrently. R., pg. 79.

At the sentencing hearing, the District Court heard argument from all parties, including a statement from a representative of the College. After all arguments, the Court proceeded to

impose a sentence on Count I of ten years fixed and four years indeterminate. R., pg. 112-118; Tr., pg. 51, ln. 2-5. With regard to Counts II through V, the Court imposed a sentence of 14 years indeterminate on each Count. R., pg. 112-118; Tr., pg. 51, ln. 6-19. The Court then ordered that all five counts were to run consecutively, amounting to a total sentence of ten years fixed and sixty (60) years indeterminate for a total of seventy years. R., pg. 112-118; Tr., pg. 51, ln. 6-19.

Ms. Orr now appeals the sentence imposed by the District Court arguing that the sentence is excessive and that the District Court abused its discretion in imposing such a harsh sentence.

II.

ISSUES PRESENTED ON APPEAL

A. The Prosecutor breached the plea agreement by impliedly disavowing and expressing reservation about the sentencing recommendation set forth in the plea agreement.

B. The District Court abused its discretion in imposing an excessive and unduly harsh sentence that was unsupported by the facts in the record.

   1. The District Court abused its discretion by essentially imposing an indeterminate life sentence which is contrary to the intent of the grand theft statute's maximum penalties.

   2. The District Court abused its discretion by categorizing Ms. Orr as a professional criminal.

   3. The District Court abused its discretion by failing to consider mitigating evidence regarding Ms. Orr's mental health issues, rehabilitation efforts and compliance with law enforcement throughout the investigation.

   4. The District Court abused its discretion by alleging that the crime of embezzlement was the "absolute worst of the theft offenses."

III.

ARGUMENT

A. The Prosecutor breached the plea agreement by impliedly disavowing and expressing reservation about the sentencing recommendation set forth in the plea agreement.

Idaho Courts have held that the breach of a plea agreement constitutes fundamental error and, therefore, defendant's failure to object in the district court does not waive the right to raise the issue for the first time on appeal. *State v. Halbesleben*, 147 Idaho 161, 164-65, 206 P.3d 867, 870-71 (Ct. App. 2009); *State v. Allen,* 143 Idaho 267, 271–72, 141 P.3d 1136, 1140–41 (Ct.App.2006). So long as there exists a sufficient record, the issue of breach may be reviewed for the first time on appeal. *Halbesleben*, 147 Idaho at 165, 206 P.3d at 871.

The United States Supreme Court has held that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York,* 404 U.S. 257, 262, 92 S.Ct. 495, 499 (1971). *See also State v. Jones*, 139 Idaho 299, 302, 77 P.3d 988, 991 (Ct. App. 2003). When a plea agreement is breached by the prosecution, the defendant is entitled to relief through either an order of the court for specific performance or through withdrawal of the guilty plea. *Santobello,* 404 U.S. at 262, 92 S.Ct. at 499; *Mabry v. Johnson,* 467 U.S. 504, 508-09, 104 S.Ct. 2543, 2546-47 (1984); *Jones*, 139 Idaho at 302, 77 P.3d at 991.

While the prosecution's obligation does not require that the agreed upon recommendation be made enthusiastically, *see United States v. Benchimol,* 471 U.S. 453, 455, 105 S.Ct. 2103, 2104 (1985); *Jones*, 139 Idaho at 301-02, 77 P.3d at 990-91, "a prosecutor may not circumvent a

plea agreement, however, through words or actions that convey a reservation about a promised recommendation, nor may a prosecutor impliedly disavow the recommendation as something which the prosecutor no longer supports." *State v. Wills*, 140 Idaho 773, 775, 102 P.3d 380, 382 (Ct. App. 2004); *Jones*, 139 Idaho at 302, 77 P.3d at 991. Although prosecutors need not use any particular form of expression in recommending an agreed sentence, "their overall conduct must be reasonably consistent with making such a recommendation, rather than the reverse." *Id.*

At sentencing, the prosecutor, when talking about Ms. Orr's prior record, informed the Court that, when making the plea agreement, the prosecutor was unaware that Ms. Orr had a prior felony conviction for Forgery. Tr., pg. 27, ln. 9-15. The prosecutor then stated "we had discussed in the office whether, based on what we had learned from the PSI, whether we should change any recommendation to the Court." Tr., pg. 27, ln. 23-25. Then, immediately after expressing these reservations about the recommendation, he prosecutor then proceeded to recommend the sentence as contained in the plea agreement. Tr., pg. 28, ln. 1-4.

As noted above, a prosecutor cannot convey a reservation about a promised recommendation or imply that they no longer support a recommendation. *Jones*, 139 Idaho at 302, 77 P.3d at 991. This is precisely what the prosecutor did in this case. Immediately prior to making the recommendation, the prosecutor casts doubt on the recommendation by stating that they were unaware of a prior conviction when making the recommendation. Making the actions even more egregious, the prosecutor then informs the Court of the reservations that they have regarding the recommendation by informing the Court that they were considering changing the recommendation. These actions are a breach of the plea agreement.

The prosecutor's words and actions constitute a breach of the plea agreement. In one breath the prosecutor sets out concern with the plea agreement and recommendation and then, in the very next breath, gives the agreed upon recommendation. The prosecutor's expression of reservation regarding the recommendation immediately prior to giving the recommendation nullifies that recommendation. Such a qualification before the Court throws into doubt the prosecutor's recommendation in violation of the agreement. Had the prosecutor truly desired to make the agreed upon recommendation, he could have done so without mention of talks regarding changing the agreement.

Given that the prosecutor breached the plea agreement, Ms. Orr seeks specific performance of the plea agreement and resentencing before a different district judge who will not have heard the prosecutor's improper recommendation. *See State v. Kennedy*, 139 Idaho 244, 246, 76 P.3d 988, 990 (Ct. App. 2003).

B. The District Court abused its discretion in imposing an unreasonable sentence that was excessive and unduly harsh sentence that was unsupported by the facts in the record.

Unlike the choice between probation and confinement, the determination regarding the length of a sentence is not guided by any statutory criteria, aside from allowable maximum terms of confinement along with sentencing enhancements where applicable. *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). The Idaho Supreme Court has held that 'reasonableness' is a fundamental requirement and that a sentence may represent a 'clear abuse of discretion' if it is shown to be unreasonable upon the facts of the case. *E.g., State v. Nice,* 103 Idaho 89, 645 P.2d 323 (1982); *State v. Dillon,* 100 Idaho 723, 604 P.2d 737 (1979). This

formulation recasts the "clear abuse" standard in positive terms, and enables the Court to focus upon the elements of "reasonableness." *Toohill*, 103 Idaho at 568, 650 P.2d at 710.

The objectives of sentencing, against which the reasonableness of a sentence is to be measured, are the protection of society, the deterrence of crime, the rehabilitation of the offender and punishment or retribution. *Toohill,* 103 Idaho at 568, 650 P.2d at 710. In examining the reasonableness of a sentence, the nature of the offense and the character of the offender are to be taken into account. *State v. Young,* 119 Idaho 510, 511, 808 P.2d 429, 430 (Ct.App.1991). To support an allegation that the trial court abused its discretion in sentencing, the defendant must show that, in light of the objectives of sentencing, the sentence was excessive under any reasonable view of the facts. *State v. Charboneau,* 124 Idaho 497, 499, 861 P.2d 67, 69 (1993); *State v. Brown,* 121 Idaho 385, 393, 825 P.2d 482, 490 (1992).

Ms. Orr contends that the District Court abused its discretion and imposed an unreasonable sentence as follows:

1. The District Court abused its discretion by essentially imposing an indeterminate life sentence which is contrary to the intent of the grand theft statute's maximum penalties.

The Court's imposition of consecutive as opposed to concurrent sentences was an abuse of discretion. By running all five counts consecutive to each other, the Court essentially imposed an indeterminate life sentence on Ms. Orr. Imposition of such an extreme length of sentence is contrary to the intent of the maximum punishments established by the Grand Theft Statute in I.C. § 18-2408(2)(a).

The imposition of consecutive sentences is authorized and made discretionary by I.C. § 18–308. *State v. Lloyd*, 104 Idaho 397, 401, 659 P.2d 151, 155 (Ct. App. 1983). The objectives of sentencing set forth in *Toohill, supra*, apply in determining the reasonableness of the Court's imposition of consecutive sentences.

At sentencing, after imposing sentence on each count, the Court stated its reason for such a sentence:

> It will give the Idaho State Department of Corrections the **rest of your natural life** to monitor you. . . But I want that board of corrections to have the power to immediately, immediately reimpose the balance of that sentence if you as much as flinch in terms of criminal conduct. It will also give the Idaho State Board of Corrections the ability to monitor you for the rest of your natural life . . .

See Tr., pg. 51-52, ln. 25-7 (emphasis added). From these statements, it is clear that the Court's purpose of imposing such an extreme sentence was for the protection of society. However, there is no basis for the court's conclusion that without such supervision Ms. Orr would again commit a crime.

During sentencing, the Court attempts to paint a picture of Ms. Orr as a persistent violator and repeat offender but such a classification is not supported by the record. Ms. Orr's criminal record consists only of one prior felony charge of Forgery. Exhibits, pg. 10-11 (PSI, pg. 9-10). PSI Ms. Orr was convicted of this crime in 1993 and was granted a withheld judgment. After successfully completing probation and paying her restitution, the felony charge was dismissed pursuant to the withheld judgment. Exhibits, pg. 10-11 (PSI, pg. 9-10). For at least fourteen years following this conviction, Ms. Orr committed no additional crimes. There are no facts in the record nor were there any presented at sentencing that would support a finding that she was

committing crimes between 1993 and her thefts from CSI. The Defendant did lead a law-abiding life for at least 14 years following her conviction in 1993.

Under *Toohill,* a sentence longer than necessary to achieve these goals constitutes an abuse of discretion. Given that the Court's imposition of consecutive sentences was based on a misguided perception of Ms. Orr as a persistent violator of the law, which is unsupported by the record, the consecutive sentences imposed were unreasonable. The consecutive sentences in this matter extend Ms. Orr's sentence far beyond that which is necessary to achieve those purposes of sentencing and, as such, should be reduced to a reasonable amount of time.

2. The District Court abused its discretion by categorizing Ms. Orr as a professional criminal.

The Court's categorization of Ms. Orr as a "professional criminal" at sentencing was completely unsupported by the record and shows the Court's skewed view of this case. At sentencing the Court stated:

> You're a professional criminal. The kid who goes out and steals the car at age 20 is a felon, but he's only committed one crime. You did it for seven years. Multiple, multiple, multiple times.

See Tr., pg. 48, lns. 16-19. The Court even went so far as to compare Ms. Orr's conduct to that of Bernie Madoff, stating:

> As I sat and tried to figure out what I was going to say to you, I kept coming back to the one case that affected me a lot when I read it, that that gentleman back in , I shouldn't call him a gentleman, he was a thief, that Mr. Madoff, and what he did to different people. Only difference between him and you was he was in the billions, you're in the hundreds of thousands.

Tr., pg. 49, lns. 19-25.

As noted above, Ms. Orr's actions do not support a conclusion that she is a professional criminal and the Court's conclusion of such is not supported by the record. Ms. Orr's record consists of just one prior felony which was committed over twenty years ago. While it is true that Ms. Orr's conduct in the case at hand continued for several years, that does not amount to a "professional criminal."

Ms. Orr would ask the Court to take into consideration the differences between herself and the well-known Madoff. The Collins English Dictionary defines "career criminal" as "a person who earns his income through criminal activities." Madoff was indeed a career criminal. Madoff's sole source of income was from the Ponzi scheme that he had created and through which he ultimately defrauded thousands of investors of billions of dollars. Federal investigators believe that Madoff's fraud began as early as the mid-1980s and may have begun as far back as the 1970s. It is estimated that the actual loss to investors due to Madoff's actions was $18 billion.

The Defendant would strongly contend that her actions, while assuredly grievous, are in no way comparable to those of Madoff. Madoff's entire fortune came as a result of his fraudulent actions. In contrast, the Defendant was employed and was able to pay her bills and provide for her family's need through her employment. It is true that the thefts for which she pleaded guilty were committed during her employment but this differs from Madoff in the sense that the very essence of Madoff's "employment" was fraudulent and criminal. Further, the Defendant would contend that the Madoff scheme was orchestrated simply to continue to

increase the wealth of Bernie Madoff, whereas the Defendant's crimes, while still wrong, were done as a result of mental health and addiction issues and as an avenue of release.

Accordingly, the Court's categorization of Ms. Orr as a "professional criminal" and comparison to Bernie Madoff was an abuse of the Court's discretion as such categorization was unreasonable and unsupported by the record.

3. The District Court abused its discretion by failing to consider mitigating evidence regarding Ms. Orr's mental health issues and rehabilitation efforts.

Next, Ms. Orr contends that the Court abused its discretion by failing to adequately take into account the mitigating evidence presented on her behalf. After admitting to her actions in this matter, Ms. Orr sought treatment for both her mental health disorder and her gambling addiction. In August of 2014, Ms. Orr began seeing Dr. Cameron Clark and was diagnosed with Bipolar Disorder, Depression, and Anxiety. Exhibits, pg.19 (PSI, pg. 18). Dr. Clark prescribed Ms. Orr several medications that, according to her statement in the PSI, have helped Ms. Orr feel better than she has her entire life. Exhibits, pg.19 (PSI, pg. 18).

Also during this same time, Ms. Orr began to see a counselor, Laurie Geren. Exhibits, pg.19-20 (PSI, pg. 18-19). Ms. Geren submitted a letter to which is attached to the PSI, wherein she set out Ms. Orr's progress and noted that Ms. Orr was participating in Cognitive Behavioral Therapy. Exhibits, pg.19-20, 48 (PSI, pg. 18-19). Furthermore, Ms. Orr also started attending Gambler's Anonymous to help her with her addiction. See Tr., pg. 32, lns. 3-4; pg. 39, ln. 6-8.

However, at sentencing, in reference to rehabilitation, the Court gave no acknowledgement to the efforts of Ms. Orr, stating:

> I do not see this as a rehabilitation issue case. When I have defendants who have substance problems or even some addiction problems, even gambling addiction problems there are times when it makes sense to try to rehabilitate the person so that they will never come back, and I don't see that that is the primary motivation for the sentence in this case for me.

Tr., pg. 49, lns. 2-7. Clearly, in spite of all of the efforts made by Ms. Orr, the Court refused to even consider the mental health issues of Ms. Orr, or her addiction issues, in contemplating the sentence. In fact, rather than considering the efforts Ms. Orr has made to address her mental health issues, the Court used these issues against her by alleging that she was not accepting responsibility for her action because of her Bipolar Disorder. Tr., pg. 43, ln. 18-22. Rather than address those things that Ms. Orr was doing in an attempt to rehabilitate and better herself, the Court instead basically alleged that Ms. Orr was beyond rehabilitation due to her one prior felony in 1993, stating:

> It indicates to me that it's just going to be a question of time when you're placed in a position that you can steal again, that you're probably going to steal . . . But that's the likely conclusion that can be drawn from your past.

Tr., pg. 45, ln. 15-20.

4. The District Court abused its discretion by alleging that the crime of embezzlement was the "absolute worst of the theft offenses."

The Court again abused its discretion, and demonstrated its skewed view of this offense, by alleging that the crime committed by Ms. Orr, embezzlement, was the "absolute worst of the theft offenses." At sentencing, the court stated:

> The legislature has made it a felony to steal property. We know that. There are thefts where somebody goes out on a one-time spree, takes a piece of somebody's property. That's grand theft. I could put them in the penitentiary 14 years for doing that. Kid steals a car. We've seen that happen. Those are the kinds of

> cases that I think judges look at and say, even though it's serious, it's not good to take other people's property, it is not the worst situation in the world, society can be protected. Embezzlement is the absolute other end of the spectrum. It is, in my view, the absolute worst of the theft offenses that can occur in this country . . .

Tr., pg, 47, ln. 1-12.

In fact, embezzlement, which is punishable under Idaho Code § 18-2408(2)(a) by up to fourteen years in prison, is not the most severe of the theft crimes according to the statutes. Under section 18-2408(1) of the Idaho Code, the crime of extortion is subject to a greater punishment than the crime of embezzlement. According to that statute, the crime of extortion is subject to imprisonment for up to twenty years, six year more than that allowed for embezzlement.

In making such a broad statement, the Court overlooks the multiple methods by which one can commit theft under the grand theft statute. See I.C. § 18-2407. The Legislature clearly took all of these different methods into account when they fashioned one single punishment for all manners of grand theft besides extortion. Had the Legislature intended for embezzlement to be subject to a greater punishment than other types of grand theft, it would have set out a separate section and punishment as has been done for extortion.

The Court not only abused its discretion by making such a statement but also misinterpreted the statute proscribing the punishment. As such, the sentence imposed was unreasonable.

VI.

CONCLUSION

Based upon the foregoing, Ms. Orr requests that the Court find that the Prosecutor breached the plea agreement and that the District Court abused its discretion by imposing an unreasonable sentence. Ms. Orr asks that the sentence imposed by the District Court be reversed and that Ms. Orr be resentenced before a different district judge.

DATED this 14th day of January, 2016.

HILVERDA MCRAE, PLLC

By: _____
Steven R. McRae
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of January, 2016, I served a true and correct copy of the within and foregoing document upon the attorney(s) or person(s) named below in the manner noted:

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